

STEVEN J. ROTHANS-State Bar No. 106579
SCOTT CARPENTER-State Bar No. 253339
YARON F. DUNKEL-State Bar No. 215873
CARPENTER, ROTHANS & DUMONT LLP
500 South Grand Avenue, 19th Floor
Los Angeles, CA 90071
(213) 228-0400 / (213) 228-0401 (Fax)
srothans@crdlaw.com; ydunkel@crdlaw.com;
scarpenter@crdlaw.comscarpenter@crdlaw.com****

Attorneys for Defendant,
CITY OF SAN BERNARDINO, a public entity

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

THE ESTATE OF ROB MARQUISE ADAMS, by and through its Personal Representatives, TAMIKA KING and ROBERT ADAMS; TAMIKA KING, individually; ROBERT ADAMS, individually. Plaintiffs, vs. CITY OF SAN BERNARDINO, and DOES 1-10, inclusive. Defendants.) Case No. 5:22-cv-02206-JGB-SP [Assigned to Hon. Judge Jesus G. Bernal]) DEFENDANT CITY OF SAN BERNARDINO'S MOTION TO RECUSE / DISQUALIFY PLAINTIFFS' COUNSEL BRADLEY GAGE AND ALL ATTORNEYS AND EMPLOYEES AT THE LAW OFFICES OF GOLBERG & GAGE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS) Date: February 27, 2023 Time: 9:00 a.m. Courtroom: "1"

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at on Monday, February 27, 2023, at 9:00 a.m., or as soon thereafter as the matter may be heard, Defendant City of San Bernardino will move the Court, in Courtroom 1, located at the United States Courthouse, Central District, 3470 Twelfth Street, Riverside, California 92501, for an order disqualifying Plaintiffs' counsel, Bradley Gage and all attorneys and employees at the Law Offices of Goldberg & Gage, from being involved in this litigation in any capacity, and having

1 any further contact with Plaintiffs. Mr. Gage and his firm have an ethical conflict of
 2 interest caused by their (1) representation of San Bernardino Lieutenant [REDACTED]¹
 3 on his claim that the San Bernardino Police Department discriminated against him by
 4 transferring him from Captain to Lieutenant in April of 2022, and (2) concurrent
 5 representation of Plaintiffs in this litigation against the City of San Bernardino's police
 6 officers and managerial, supervisorial, and policymaking employees' constitutional
 7 violations, negligent training, tortious hiring and supervision of personnel, and
 8 attempts to destroy evidence. As the police Captain of Operations until 2022 and since
 9 then a Lieutenant in charge of police records, Lieutenant [REDACTED] is part of the police
 10 department's Command Staff, is a witness to several of Plaintiffs' allegations, and has
 11 confidential information about police department's collection and maintenance of
 12 evidence, police policies, and police procedures in regard to officer training and
 13 investigation of Officer Involved Shooting. Mr. Gage and his firm's representation
 14 of Plaintiffs and the Lieutenant constitutes an ethical violation, and counsel must be
 15 disqualified under the California Rules of Professional Conduct. Rule 1.7 (previously
 16 Rule 3-310), and well-settled attorney ethical principles that an attorney may not
 17 represent even in separate lawsuits one set of plaintiffs when counsel currently or
 18 previously represented a client who is a relevant witness to the plaintiffs' allegations.

19 This motion is made following a telephonic meeting and conference pursuant
 20 to C.D. Cal. R. 7-3 on January 5, 2023. The parties could not agree on a resolution
 21 without the Court's intervention. [Dunkel Decl. ¶3.]

22 The motion is based on this notice, the attached memorandum of law and
 23 declaration of Chief Darren Goodman, Declaration of Yaron Dunkel, with exhibits,
 24 the proposed order lodged herewith, all pleadings and papers on file herein, and on
 25 such other evidence and argument as the Court deems appropriate or convenient.

26 ///

27

28¹ For purpose of protecting his privacy, this motion redacts the name of the San
 Bernardino Police Department Lieutenant represented by Plaintiffs' counsel.

1 DATED: January 20, 2023

2 CARPENTER, ROTHANS & DUMONT
3 LLP

4 By: /s/ Yaron F. Dunkel

5 STEVEN J. ROTHANS

6 SCOTT CARPENTER

7 YARON F. DUNKEL

8 Attorneys for Defendant CITY OF SAN
9 BERNARDINO, a public entity

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

2	Page
3	I. PLAINTIFFS' ALLEGATIONS IN THIS LAWSUIT ARE A CONFLICT OF
4	INTEREST FOR ATTORNEY BRADLEY GAGE AND HIS LAW FIRM ..1
5	II. PLAINTIFFS' COUNSEL BRADLEY GAGE ALSO REPRESENTS
6	LIEUTENANT ██████████ OF THE SAN BERNARDINO POLICE
7	DEPARTMENT WHO IS THE RECORDS MANAGER AND WAS
8	INVOLVED IN ALL ASPECTS OF POLICE OFFICER TRAINING AND
9	HIRING2
10	A. Mr. Gage Represents Lieutenant ██████████ In His Employment
11	Claims Against The City For Wrongfully Transferring Him From
12	Captain of Operations Division To Lieutenant.....2
13	B. Lieutenant ██████████ Was Captain of Operations Division Until April 2022
14	and Since 2022, As A Lieutenant In Charge of Records, Is Part Of The
15	Police Command Staff With Knowledge Of Police Practices.....3
16	III. THIS COURT IS AUTHORIZED TO DISQUALIFY AN ATTORNEY WHO
17	HAS A CONFLICT OF INTEREST5
18	A. California Law Governs Grounds To Disqualify Mr. Gage And Other
19	Lawyers From His Firm.....5
20	B. This Court Has The Inherent Authority To Disqualify An Attorney And
21	His Law Firm To Preserve The Public Trust And Integrity Of The
22	Profession.....6
23	C. The Defendant Public Entity Has Standing To Move To Disqualify Mr.
24	Gage7
25	D. Mr. Gage Must Be Automatically Disqualified Where His Claims On
26	Behalf Of The Plaintiffs Implicate Lieutenant ██████████ As The City's
27	Witness.....8
28	E. Attorney's Gage's Representation of Plaintiffs Violates Lieutenant
29	███████████' Confidence Regarding The City's Policies, Procedures And
30	Activities11
31	F. Plaintiffs and Lieutenant ██████████ May Not Give Consent To The Dual
32	Representation Or Waive The Conflict Of Interest.13
33	IV. CONCLUSION14

TABLE OF AUTHORITIES

2	Page(s)
3	Other Authorities
4	<u>Adams v. Aerojet-General Corp.</u> , 86 Cal.App.4th 1324 (2001.)..... 11, 12
5	<u>Beltran v. Avon Products, Inc.</u> , 867 F.Supp.2d 1068 (C.D. CA 2012) 5
6	<u>Blue Water Sunset, LLC v. Markowitz</u> , 192 Cal.App.4th 477 (2011)..... 9
7	<u>City & County of San Francisco v. Cobra Solutions, Inc.</u> , 38 Cal.4th 839 (Cal. 2006)..... 6
8	<u>Comden v. Sup.Ct. (Doris Day Distrib. Co.)</u> , 20 Cal.3d 906 (Cal. 1978)..... 6
9	<u>Concat LP v. Unilever, PLC</u> , 350 F.Supp.2d 796 (N.D.Cal.,2004) 7
10	<u>County of Los Angeles v. Superior Court</u> , (1990) 222 Cal.App.3d 647..... 6, 8
11	<u>Dino v. Pelayo</u> , 145 Cal.App.4th 347 (2006)..... 7
12	<u>Erickson v. Newmar Corp.</u> , 87 F.3d 298 (9th Cir. 1996)..... 6
13	<u>Flatt v. Superior Court</u> , 9 Cal.4th 275 (Cal.,1994.)..... 8, 9, 11, 12
14	<u>Great Lakes Construction, Inc. v. Burman</u> , 186 Cal.App.4th 1347 (2010)..... 7
15	<u>Hollywood v. Sup.Ct. (People)</u> , 43 Cal.4th 721 (Cal. 2008)..... 6
16	<u>In re County of Los Angeles</u> , 223 F.3d 990 (9th Cir. 2000)..... 5
17	<u>Kennedy v. Eldridge</u> , 201 Cal.App.4th 1197 (2011)..... 7, 11
18	<u>Klemm v. Superior Court</u> , 75 Cal.App.3d 893 (1977.)..... 13
19	<u>Lightbourne v. Dugger</u> , 829 F.2d 1012 (11th Cir. 1987)..... 9
20	<u>McMillan v. Shadow Ridge at Oak Park Homeowner's Ass'n</u> , 165 Cal.App.4th 960 (2008)..... 6

1	<u>Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.,</u>	
2	36 Cal.App.4th 1832 (1995).....	7
3	<u>People ex rel v. SpeeDee Oil Change,</u>	
4	20 Cal.4th 1135 (Cal. 1999).....	6, 11
5	<u>People v. Jones,</u>	
6	33 Cal.4th 234(Cal., 2004).....	7, 13
7	<u>Rodriguez v. W. Publ'g Corp.,</u>	
8	563 F.3d 948 (9th Cir. 2009).....	5
9	<u>S.E.C. v. King Chuen Tang,</u>	
10	831 F.Supp.2d 1130 (N.D.Cal., 2011)	7
11	<u>Sharp v. Next Entertainment, Inc.,</u>	
12	163 Cal.App.4th 410 (2008).....	8
13	<u>U.S. v. Iorizzo,</u>	
14	786 F.2d 52 (2nd Cir. 1986.).....	7, 9
15	<u>U.S. v. Williams,</u>	
16	81 F.3d 1321 (4th Cir. 1996).....	8, 13
17	<u>United States ex rel. Stewart on behalf of Tineo v. Kelly,</u>	
18	870 F.2d 854 (2d Cir.1989).....	7, 9, 13
19	<u>United States v. Baker,</u>	
20	10 F.3d 1374 (9th Cir. 1993).....	12
21	<u>United States v. Locascio,</u>	
22	6 F.3d 924 (2d Cir. 1993).....	8
23	<u>United States v. Moscony,</u>	
24	927 F.2d 742 (3d Cir. 1991).....	8
25	<u>Wheat v. U.S.,</u>	
26	486 U.S. 153 (U.S., 1988)	7, 13
27	Rules	
28	California Rules of Professional Conduct. Rule 1.7	8
	Rule 1.7(d)(3)	8

MEMORANDUM OF POINTS AND AUTHORITIES

**I. PLAINTIFFS' ALLEGATIONS IN THIS LAWSUIT ARE A CONFLICT OF
INTEREST FOR ATTORNEY BRADLEY GAGE AND HIS LAW FIRM**

4 Plaintiffs are Tamika King and Robert Adams (“Plaintiffs”). They filed a
5 complaint alleging that in July of 2022, San Bernardino Police Department (“SBPD”)
6 officers shot their son and violated his constitutional rights. [Complaint, ¶2.] They
7 sued the City of San Bernardino (“City”), police officers, and “managerial,
8 supervisorial, and policymaking employees” of the police department who were
9 “acting with complete authority and ratification” for the City. [Complaint, ¶8, p. 2:16-
10 21.] Plaintiffs allege that the defendants attempted to destroy and conceal evidence,
11 such as decedent’s cell phone, autopsy reports, and the video and photographs from
12 the autopsy. [Complaint, ¶16, p. 23-24; ¶19, 5:9-10.]

13 Plaintiffs further allege that the officers used “poor tactics”, and that
14 managerial, supervisorial, and policymaking employees “fail[ed] to train and
15 supervise” the officers. [Complaint, ¶20, p. 5:11-12, and ¶49(e), p. 11:2-4.] Plaintiffs
16 also allege that managerial, supervisorial, and policymaking employees knew that the
17 officers “had prior complaints of excessive force, covering up such claims and or
18 writing or making false allegations in police reports and/or other acts of violence or
19 excessive force brought against defendant [the] City”, and that the City “ratified and
20 approved the actions” of the officers. [Complaint, ¶20, p. 5:12-15; and ¶2, p. 2:3-6.]
21 Plaintiffs further allege that “each and every defendant was the co-conspirator with,
22 and/or agent of each and every other defendant and had the legal duty to oversee and
23 supervise the hiring, conduct, and employment of each and every defendant.”
24 [Complaint, ¶12, p. 5:5-8.] Plaintiffs seek punitive damages from these same
25 “managerial, supervisorial, and policymaking employees”.

26 As discussed below, Mr. Gage's representation of the Plaintiffs in this case is
27 an ethical violation because he also represents SBPD Lieutenant [REDACTED], who was
28 the Captain of Operations until April of 2022 and has since been in charge of records,

1 and which conflict cannot be waived. It is an obvious ethical conflict for Mr. Gage to
2 allege that the police department personnel destroyed and concealed evidence, failed
3 to train officers, and hired and retained officers knowingly with alleged prior
4 complaints of constitutional violations, while concurrently represent Lieutenant [REDACTED],
5 who until April of 2022, just three months before the incident, was the Captain of
6 Operations Division, since April of 2022 has been the police Communication and
7 Records Manager, and previously for years was the Field Training Program
8 Supervisor, Department's Personnel & Training Unit Manager, had performed the
9 duties of Patrol Watch Commander, and was responsible for officer training. As
10 discussed below, Mr. Gage and his law firm must not be permitted to represent the
11 Plaintiffs and must be disqualified from having any further involvement in the
12 Plaintiffs' litigation.

13 **II. PLAINTIFFS' COUNSEL BRADLEY GAGE ALSO REPRESENTS**
14 **LIEUTENANT [REDACTED] OF THE SAN BERNARDINO POLICE**
15 **DEPARTMENT WHO IS THE RECORDS MANAGER AND WAS**
16 **INVOLVED IN ALL ASPECTS OF POLICE OFFICER TRAINING**
17 **AND HIRING**

18 **A. Mr. Gage Represents Lieutenant [REDACTED] In His**
19 **Employment Claims Against The City For Wrongfully**
20 **Transferring Him From Captain of Operations Division To**
21 **Lieutenant.**

22 Attorney Gage and his firm are concurrently representing SBPD Lieutenant
23 [REDACTED] in his complaint against the City of San Bernardino for employment
24 retaliation in his position as the Captain until April 2022, when he was made police
25 Lieutenant. [Exhibit "A", pgs. 008-10; p. 009:3-4.] Mr. Gage's office served on the
26 City a copy of Lieutenant [REDACTED]' "DFEH complaint, Notice of Case Closure, and Right
27 to Sue filed against the City of San Bernardino by [REDACTED]". [Exhibit "A", p. 002.]
28 The Department of Fair Employment & Housing's cover letter enclosing the Right to

1 Sue Letter was directed to attorney Bradely Gage [Exhibit "A", p. 003], and the Right
 2 to Sue letter itself, also dated July 26, 2022, was directed to "██████████ c/o Law
 3 Offices of Goldberg & Gage". [Exhibit "A", pg. 006.]

4 **B. Lieutenant █████ Was Captain of Operations Division Until**
 5 **April 2022, Then As A Lieutenant In Charge of Records, Is**
 6 **Part Of The Police Command Staff With Knowledge Of Police**
 7 **Practices.**

8 Lieutenant █████ has been an employee of the SBPD since 1997 to the present.
 9 [Declaration of Chief Darren Goodman, ¶10.] Lieutenant █████ started in 1997 as a
 10 reserve officer and became a full-time officer in 2008 and had been promoted over the
 11 years. [Ibid. ¶10, p. 2:24-25.] Between 2010 to 2012, he was the Problem-Oriented
 12 Policing Officer, District Resource Officer, and Vice Investigator. [Ibid., ¶10, p. 2:25-
 13 27.] As a Police Officer, he held assignments as a Patrol Officer, Field Training
 14 Officer, Problem Oriented Policing/District Resource Officer, and Vice Investigator.
 15 [Ibid., ¶10, p. 2:27-3:1.] In 2012, he was certified to the rank of Sergeant, serving as
 16 a Patrol Supervisor, Watch Commander, K-9 Unit Supervisor, Field Training Program
 17 Supervisor, Cadet Program Supervisor, and Reserve Unit Supervisor. [Ibid., ¶10, p.
 18 3:1-3.] He was also assigned as the Department's Personnel & Training Unit
 19 Manager, where he was responsible for hiring new police officers and professional
 20 staff, as well as providing in-service and continuing education training to all
 21 Department personnel. [Ibid., ¶10, p. 3:3-6.] He was promoted to the rank of
 22 Lieutenant in 2017 and performed the duties of an Executive Officer and Patrol Watch
 23 Commander. [Ibid., ¶10, p. 3:6-8.] As a Lieutenant, he was also assigned to work for
 24 the City Manager, completing special projects and helping to create and facilitate the
 25 City's Community Organization and Rebuilding Effort (CORE) task force. [Ibid.,
 26 ¶10, p. 3:8-11.] On January 7, 2019, he was certified as the acting Captain, where he
 27 was responsible for all uniformed officers patrol functions as well as the Department's
 28 Community Oriented Policing efforts. [Ibid., ¶10, p. 3:11-14.] On January 27, 2020,

1 he was promoted to the rank of Captain of Operations Division, a position he held
 2 until April 2022, and reported directly to the Chief of Police. [Ibid., ¶10, p. 3:11-15.]
 3 In April 2022, he became a Lieutenant again. [Ibid., ¶10, p. 3:15-16.] In his capacity
 4 as Lieutenant since April of 2022, he has been the Communications and Records
 5 Manager which oversees the dispatch and records and is a member of the police
 6 departments Command Staff. [Ibid., ¶10, p. 3:16-18.]

7 In these various positions Lieutenant [REDACTED] has been directly involved in hiring
 8 new police officers and providing in-service and continuing education training to
 9 police officers. [Ibid., ¶11, p. 3:19-22.] Therefore, since at least 2012 through 2022,
 10 he was in charge of supervision, hiring, and conducting training of new and existing
 11 officers, and in deciding and enforcing police policies and tactics. [Ibid., ¶11, p. 3:22-
 12 28.] In April 2022, Captain [REDACTED] became a Lieutenant again, and is currently in
 13 charge of dispatch and records. [Ibid., ¶10, p. 3:15-18.] Further, Lieutenant [REDACTED]
 14 knows the manner in which the SBPD maintains records and evidence; how the SBPD
 15 handles and investigates Officer Involved Shootings; how SBPD detectives gather,
 16 process, handle, and preserve evidence following an Officer Involved Shooting; the
 17 type of evidence that is gathered during the SBPD's investigations; the SBPD's
 18 decision-making during the criminal investigation; and how the City handles
 19 administrative investigations that arise out from an Officer Involved Shooting. [Ibid.,
 20 ¶12, p. 4:1-10.]

21 Because Lieutenant [REDACTED] is directly involved overseeing the Department's
 22 records, Plaintiffs' allegations that the police managerial, supervisory, and
 23 policymaking and other personnel "attempted to destroy the evidence" in this case, as
 24 well as hide and conceal evidence, including the decedent's mobile phone on July 16,
 25 2022, autopsy reports, and video and photographs from the autopsy [Complaint, ¶16,
 26 p. 23-24; ¶19, 5:9-10], all implicate Lieutenant [REDACTED]' knowledge about how the police
 27 maintains records and evidence and conducts its investigation of Officer Involved
 28 Shooting. Moreover, Plaintiffs' allegations against the SBPD's management

1 personnel for inadequate training of officers, for knowingly hiring and retaining
 2 personnel with alleged prior history of violating rights, and for using poor tactics, all
 3 directly challenge Lieutenant [REDACTED]' hiring, supervision and training of police
 4 personnel and approval of police tactics, not only when he was the Captain of
 5 Operations for 2 years until just before the incident, but also during the previous years
 6 he was involved in hiring and training of officers. The possibility that Mr. Gage and
 7 his office will need to cross-examine Lieutenant [REDACTED] either in deposition or at trial
 8 regarding hiring, supervision, and training of officers, use of tactics, investigation
 9 procedures for Officer Involved Shooting, or on management and maintenance of
 10 evidence after the incident, or otherwise question his knowledge or credibility, all
 11 creates an inherent conflict of interest for Mr. Gage and his firm, which cannot be
 12 waived. Therefore, Mr. Gage and his law firm cannot be permitted to have any
 13 involvement in this litigation, and this Court should disqualify Mr. Gage and all
 14 attorneys and employees at his law firm from being involved in any capacity in this
 15 litigation.

16 **III. THIS COURT IS AUTHORIZED TO DISQUALIFY AN ATTORNEY**
 17 **WHO HAS A CONFLICT OF INTEREST.**

18 **A. California Law Governs Grounds To Disqualify Mr. Gage**
 19 **And Other Lawyers From His Firm.**

20 Federal courts apply the state law in disqualifying an attorney. In re County of
 21 Los Angeles, 223 F.3d 990, 995 (9th Cir. 2000). “Attorneys practicing in [the central]
 22 district must ‘be familiar with and comply with the standards of professional conduct
 23 required of members of the State Bar of California and contained in the State Bar Act,
 24 the Rules of Professional Conduct of the State Bar of California, and the decisions of
 25 any court applicable thereto.’” Beltran v. Avon Products, Inc., 867 F.Supp.2d 1068,
 26 1076 (C.D. CA 2012), C.D. Cal. R. 83-3.1.2. The Central District has adopted
 27 California’s ethical standards governing attorney conflicts of interest. Rodriguez v.
 28 W. Publ’g Corp., 563 F.3d 948, 967 (9th Cir. 2009), stating “By virtue of the district

court's local rules, California law controls whether an ethical violation occurred".

B. This Court Has The Inherent Authority To Disqualify An Attorney And His Law Firm To Preserve The Public Trust And Integrity Of The Profession

This Court has the inherent authority to disqualify an attorney through its authority “[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.” People ex rel v. SpeeDee Oil Change 20 Cal.4th 1135, 1145 (Cal. 1999); City & County of San Francisco v. Cobra Solutions, Inc. 38 Cal.4th 839, 846 (Cal. 2006); Erickson v. Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996) (district courts have “an arsenal of sanctions they can impose for unethical behavior,” including “disqualification of counsel”); see also People ex rel. Dep’t of Corporations v. SpeeDee Oil Change Sys., Inc., 20 Cal. 4th 1135, 1145 (1999) (“A trial court’s authority to disqualify an attorney derives from the power inherent in every court to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it.”)

The paramount justification and ground to disqualify an attorney is preserving public trust in the scrupulous administration of justice and the integrity of the bar, which concern overcomes the right of plaintiffs to select the counsel of their choice. People ex rel v. SpeeDee Oil Change 20 Cal.4th 1135, 1145-46 (Cal. 1999); City & County of San Francisco, *supra*, 38 C4th at 846; Comden v. Sup.Ct. (Doris Day Distrib. Co.) 20 Cal.3d 906, 915 (Cal. 1978). “[U]ltimately the issue involves a conflict between a client's right to counsel of his choice and the need to maintain ethical standards of professional responsibility. ‘The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount.... [The client's recognizably important right to counsel of his choice] must yield, however, to considerations of ethics which run to the very integrity of our

1 judicial process.’ [Citation.]” County of Los Angeles v. Superior Court (1990) 222
2 Cal.App.3d 647, 658. The goal is to remedy and prevent the prejudice caused by the
3 plaintiffs’ counsel conflict of interest. McMillan v. Shadow Ridge at Oak Park
4 Homeowner's Ass'n 165 Cal.App.4th 960, 968 (2008); Hollywood v. Sup.Ct. (People)
5 43 Cal.4th 721, 731 (Cal. 2008).

6 ///

7 **C. The Defendant Public Entity Has Standing To Move To
8 Disqualify Mr. Gage**

9 A party seeking to disqualify an attorney merely can show a “fiduciary or quasi-
10 fiduciary relationship ... between the attorney and the source of the confidential
11 information.” Dino v. Pelayo, 145 Cal.App.4th 347, 353 (2006). Thus, a party may
12 disqualify counsel even if the moving party is not the counsel’s client. S.E.C. v. King
13 Chuen Tang, 831 F.Supp.2d 1130, 1143 (N.D.Cal., 2011), stating “many district
14 courts have invoked the exception ...to find that a non-client had standing to seek
15 disqualification based on a conflict with a third party”; Concat LP v. Unilever, PLC,
16 350 F.Supp.2d 796, 818 (N.D.Cal.,2004); Metro-Goldwyn-Mayer, Inc. v. Tracinda
17 Corp., 36 Cal.App.4th 1832, 1840 (1995), holding that disqualification is appropriate
18 where the moving party is not the attorney’s client; Great Lakes Construction, Inc. v.
19 Burman, 186 Cal.App.4th 1347, 1357 (2010), holding that the moving party need only
20 have personal stake in the motion; Kennedy v. Eldridge, 201 Cal.App.4th 1197, 1204
21 (2011), stating “where the ethical breach is ‘manifest and glaring’ and so ‘infects the
22 litigation in which disqualification is sought that it impacts the moving party's interest
23 in a just and lawful determination of [his or] her claims’ [citation], a nonclient might
24 meet the standing requirements to bring a motion to disqualify based upon a third
25 party conflict of interest or other ethical violation.”

26 Thus, courts have granted a non-client’s motion to disqualify an attorney when
27 that attorney previously represented the moving party’s witness, which the attorney
28 may need to cross-examine either in deposition or trial. United States ex rel. Stewart

1 on behalf of Tineo v. Kelly, 870 F.2d 854, 856 (2d Cir.1989), (hereinafter “Stweart”);
 2 Wheat v. U.S., 486 U.S. 153, 155 (U.S., 1988), followed in People v. Jones, 33 Cal.4th
 3 234, 241(Cal., 2004); U.S. v. Iorizzo, 786 F.2d 52, 57 (2nd Cir. 1986.) A public entity
 4 may move to disqualify counsel who had a conflict of interest with several defendants,
 5 although the public entity is not the attorney’s client. Wheat v. U.S., 486 U.S. 153,
 6 155 (U.S., 1988), followed in People v. Jones, 33 Cal.4th 234, 241 (Cal., 2004), even
 7 where the defendants waived the conflict. A party may even move to disqualify a
 8 lawyer for contacting the defendant’s witness. County of Los Angeles v. Superior
 9 Court (1990) 222 Cal.App.3d 647, 658, ordering that trial court to grant a motion to
 10 disqualify the attorney who had contacted the government’s expert witness. Here, the
 11 conflict of interest is significant that it infects the proceedings and threatens the City’s
 12 right to a just determination of the claims, by invading the credibility and confidence
 13 of the witnesses.

14 **D. Mr. Gage Must Be Automatically Disqualified Where His
 15 Claims On Behalf Of The Plaintiffs Implicate Lieutenant [REDACTED]
 16 As The City’s Witness.**

17 An attorney has a conflict of interest where the circumstances of the case
 18 present “a substantial risk that the lawyer’s representation of the client would be
 19 materially and adversely affected by the lawyer’s own interests or by the lawyer’s
 20 duties to another current client, a former client, or a third person.” Sharp v. Next
 21 Entertainment, Inc., 163 Cal.App.4th 410, 426 (2008), internal quotes and emphasis
 22 omitted. California Rules of Professional Conduct. Rule 1.7 “Conflict of Interest:
 23 Current Clients” expressly prohibits an attorney from representing a plaintiff in any
 24 matter that involves “an assertion of a claim by that client against another client... in
 25 the same litigation”. Sharp, *supra*, 163 Cal.App.4th at 426, citing to Rule 1.7(d)(3);
 26 Flatt v. Superior Court, 9 Cal.4th 275, 284 (Cal., 1994.) Internal citation omitted.

27 This also means that an attorney must be disqualified if the attorney may need
 28 to cross-examine his other client to prove the claims of his plaintiffs. U.S. v. Williams,

1 81 F.3d 1321, 1324 (4th Cir. 1996) (disqualifying counsel who would have had to cross
 2 examine a former client who was a potential witness for the opposing party); United
 3 States v. Locascio, 6 F.3d 924 (2d Cir. 1993) (disqualifying counsel who had
 4 previously represented a government witness); United States v. Moscony, 927 F.2d
 5 742, 747-48 (3d Cir. 1991) (disqualifying counsel because counsel's duty to former
 6 client precludes zealous cross-examination of the former client with whom counsel
 7 previously had privileged communication); United States v. Kelly, 870 F.2d 854, 857
 8 (2d Cir. 1989) (holding defense counsel's prior representation of government witness
 9 prevented the necessary vigorous cross-examination); Lightbourne v. Dugger, 829
 10 F.2d 1012, 1023 (11th Cir. 1987) (observing that counsel cannot cross-examine a
 11 former client because of inherent divided loyalties); Iorizzo, *supra*, 786 F.2d at 57
 12 (holding that an attorney must be disqualified where the attorney may have to
 13 challenge the previous client's honesty.)

14 In Iorizzo, the government moved to disqualify a defense attorney for conflict
 15 of interest where the attorney had previously represented the government's key
 16 witness in another case. Iorizzo, *supra*, 786 F.2d at 57. The government witness'
 17 credibility was relevant to the defendant's defenses, and the attorney would have had
 18 to question the witness' credibility. "As the government's key witness, Tietz'
 19 credibility went directly to the guilt or innocence of the defendant. A key witness'
 20 prior statements under oath that cast doubt upon the accuracy of his trial testimony are
 21 an obvious subject of potential cross-examination." Ibid.

22 It also does not matter that the two lawsuits or claims are unrelated. "Indeed,
 23 in all but a few instances, the rule of disqualification in simultaneous representation
 24 cases is a *per se* or "automatic" one.... [and] adverse representation is *prima facie*
 25 improper....". Flatt, *supra*, 9 Cal.4th at 285; Blue Water Sunset, LLC v. Markowitz,
 26 192 Cal.App.4th 477, 487 (2011), stating that "If an attorney simultaneously
 27 represents two clients with adverse interests, automatic disqualification is the rule in
 28 all but a few instances."

1 Here, there can be no doubt that Mr. Gage has a conflict of interest with
 2 Lieutenant [REDACTED] because Lieutenant [REDACTED] is a material witness for the City regarding
 3 Plaintiffs' claims. First, Plaintiffs allege that police personnel "attempted to destroy
 4 the evidence" in this case, as well as hide and conceal evidence, including the
 5 decedent's cell phone on July 16, 2022, autopsy reports, and video and photographs
 6 from the autopsy. [Complaint, ¶16, p. 23-24; ¶19, 5:9-10.] Lieutenant [REDACTED] has been
 7 the Communications and Records Manager which oversees the dispatch and records
 8 since April of 2022. [Chief Goodman, ¶10, p. 3:16-18.] He has information on how
 9 San Bernardino Police Department maintains records and evidence [Chief Goodman,
 10 ¶12, p. 4:1-6.] Plaintiffs' allegations implicate the Lieutenant's knowledge about
 11 whether the police destroyed or concealed evidence.

12 Further, Plaintiffs' allegations that the police managerial, supervisorial, and
 13 policymaking employees failed to train the officers [Complaint, ¶20, p. 5:12-15; and
 14 ¶49.g., p. 11:8], and that they hired and retained police officers who "had prior
 15 complaints of excessive force, covering up such claims and or writing or making false
 16 allegations in police reports and/or other acts of violence or excessive force brought
 17 against defendant CITY" [Complaint, ¶20, p. 5:12-15; and ¶2, p. 2:3-6], all directly
 18 implicate Lieutenant [REDACTED]' role in hiring, training, and supervision of police officers
 19 for years, all through his role as Captain of Operations. As set forth in the declaration
 20 of Chief Goodman, Lieutenant [REDACTED] had been a Patrol Officer, Field Training Officer,
 21 Problem Oriented Policing/District Resource Officer, and Vice Investigator, Patrol
 22 Supervisor, Watch Commander, K-9 Unit Supervisor, Field Training Program
 23 Supervisor, Cadet Program Supervisor, and Reserve Unit Supervisor, and was also
 24 assigned as the Department's Personnel & Training Unit Manager, where he was
 25 responsible for hiring new police officers and professional staff, as well as providing
 26 in-service and continuing education training to all Department personnel. [Ibid., ¶10,
 27 p. 2:27-3:6.] He was promoted to the rank of Lieutenant in 2017 and performed the
 28 duties of an Executive Officer and Patrol Watch Commander. [Ibid., ¶10, p. 3:6-8.]

1 On January 7, 2019, he was certified as the acting Captain, and on January 27, 2020
 2 was promoted to the rank of Captain of Operations Division where he was responsible
 3 for all uniformed officers patrol functions as well as the Department's Community
 4 Oriented Policing efforts, and directly reported to the Chief of Police. [Ibid., ¶10, p.
 5 3:11-15.] He held this position until April 2022. [Ibid., ¶10, p. 3:14.] In those
 6 positions, he also has knowledge about the SBPD handles and conducts investigations
 7 of Officer Involved Shootings. [Ibid., ¶12, p. 4:3-10.]

8 Clearly, plaintiffs allegations that managerial, supervisorial, and policymaking
 9 employees failed to properly train officers, or hired or retained officers with alleged
 10 "prior complaints of excessive force, covering up such claims and or writing or
 11 making false allegations" implicate Lieutenant [REDACTED] as a relevant witness to respond
 12 to Plaintiffs' complaint. Mr. Gage and his firm cannot represent Lieutenant Gage in
 13 his complaint against the City, while simultaneously cross-examine him about the
 14 Plaintiffs' claims about Lieutenant [REDACTED] ' own hiring, training, and supervision of
 15 officers, and use of police tactics. Mr. Gage has a clear conflict of interest.

16 **E. Attorney's Gage's Representation of Plaintiffs Violates
 17 Lieutenant [REDACTED] ' Confidence Regarding The City's Policies,
 18 Procedures And Activities.**

19 A second reason for disqualifying Mr. Gage is "the need to protect the first
 20 client's confidential information[; this] requires that the attorney be disqualified from
 21 the second representation." People ex rel. Dept. of Corporations v. SpeeDee Oil
22 Change Systems, Inc., 20 Cal.4th 1135, 1146 (Cal., 1999.) "If a substantial
 23 relationship is established [between the lawsuits], the discussion should ordinarily
 24 end. The rights and interest of the former client will prevail. Conflict would be
 25 presumed; disqualification will be ordered.'" Flatt v. Superior Court, 9 Cal.4th 275,
 26 283 (Cal.,1994.) The "substantial relationship test is founded on the need to protect
 27 against the improper use of client secrets". Id. at 284. Cases are deemed substantially
 28 related wherever "confidential information material to the current dispute would

1 normally have been imparted to the attorney by virtue of the nature of the former
 2 representation.” Adams v. Aerojet-General Corp., 86 Cal.App.4th 1324, 1332 (2001.)
 3 “[D]isqualification is proper where, as a result of a ...representation [of current or
 4 former client] ... there is a reasonable probability counsel has obtained information
 5 the court believes would likely be used advantageously against an adverse party
 6 during the course of the litigation.”” Kennedy, *supra*, 201 Cal.App.4th at 1205.

7 The “presumption that an attorney has access to privileged and confidential
 8 matters relevant to a subsequent representation extends the attorney's disqualification
 9 vicariously to the attorney's entire firm.” Flatt, *supra*, 9 Cal.4th at 283. “It is now
 10 firmly established that where the attorney is disqualified from representation due to
 11 an ethical conflict, the disqualification extends to the entire firm.” Adams v. Aerojet-
 12 General Corp., 86 Cal.App.4th at 1333. The 9th Circuit has already stated that any
 13 cross-examination of a former client raises “the possibility of an unwitting disclosure
 14 of confidential communications.” United States v. Baker, 10 F.3d 1374, 1399 (9th Cir.
 15 1993).

16 Here, there is a substantial relationship between Lieutenant [REDACTED]’ work as the
 17 Captain of Operations Division and eventual reassignment as a Lieutenant where he
 18 is in charge of records, and Plaintiffs’ claims that the police (1) destroyed and
 19 concealed evidence, and that (2) managerial and supervisor personnel failed to train
 20 officers, and hired personnel with previous history of violating rights. As set forth
 21 above and in Declaration of Chief Goodman, Lieutenant [REDACTED] has been involved in
 22 hiring, retaining, training, and supervising police officers for years, all through 2022.
 23 [Chief Goodman Decl. ¶11.] Moreover, Lieutenant [REDACTED] has knowledge about the
 24 manner in which the San Bernardino Police Department handles and investigates
 25 Officer Involved Shootings. [Chief Goodman Decl. ¶12.] Yet, Mr. Gage accuses
 26 “managerial, supervisory, and policymaking employees” of hiding and concealing
 27 evidence such as the autopsy report, videos of that autopsy and pictures, when
 28 Lieutenant [REDACTED] was already in charge of records. [Complaint, ¶19, p. 5:8-10.] Mr.

1 Gage, by representing the Captain of the Operations Divisions and the current
 2 Communications and Records Manager, is presumed to have obtained and have access
 3 to Lieutenant [REDACTED]’ knowledge on issues regarding how the SBPD investigates
 4 Officer Involved Shooting, how it maintains evidence, how it trains officers, what
 5 knowledge it has about the officers it hires and retains, and what tactics it trains its
 6 officers. Mr. Gage’s representing the Plaintiffs in this litigation creates a likelihood
 7 that he would use confidences from Lieutenant [REDACTED] in this litigation.

8 **F. Plaintiffs and Lieutenant [REDACTED] May Not Give Consent To The**
 9 **Dual Representation Or Waive The Conflict Of Interest.**

10 An attorney may not obtain consent from his two clients “where there is an
 11 actual, present, existing conflict and the discharge of duty to one client conflicts with
 12 the duty to another.” Klemm v. Superior Court, 75 Cal.App.3d 893, 898 (1977.) “As
 13 a matter of law a purported consent to dual representation of litigants with adverse
 14 interests at a contested hearing would be neither intelligent nor informed. Such
 15 representation would be per se inconsistent with the adversary position of an attorney
 16 in litigation, and common sense dictates that it would be unthinkable to permit an
 17 attorney to assume a position at a trial or hearing where he could not advocate the
 18 interests of one client without adversely injuring those of the other.” Ibid.

19 In Stewart, the appellate court granted the government’s writ of mandamus and
 20 ordered the trial court to disqualify an attorney who had obtained from his client a
 21 waiver of conflict of interest. Stewart, supra, 870 F.2d at 857 (holding that an attorney
 22 may not offer to limit the scope of his cross-examination of the witness to certain
 23 issues because such limitation was unprofessional.) “It is hard to conceive of a conflict
 24 of interest between clients that would not be serious.... there can be no doubt that
 25 [attorney] Linn’s potential conflict was serious, that his loyalty was divided between
 26 a client and a former client, and that representing [client] Tineo would have created a
 27 strong appearance of impropriety. This is no less true simply because [attorney] Linn’s
 28 representation of the clients did not concern the same matter, Two clients’ interests

1 in separate matters may be just as opposed, and the potential for conflict just as
 2 serious.” Ibid. The Court “emphasizes the primacy of the court’s concern for integrity
 3 of the process—to the point of reversing for abuse of discretion a district court’s
 4 refusal, because of party waiver, to disqualify” the attorney. U.S. v. Williams, 81 F.3d
 5 1321, 1324 (4th Cir. 1996); also Wheat, *supra*, 486 U.S. at 155 followed in Jones,
 6 *supra*, 33 Cal.4th at 241 (granting the government’s motion to disqualify counsel
 7 whose clients waived the conflict.)

8 Here, Mr. Gage and his firm obviously cannot ethically obtain a waiver of the
 9 conflict, but even if they did, the waiver cannot be accepted. The complaint that Mr.
 10 Gage had filed on behalf of the Plaintiffs in this case are so adverse to Lieutenant
 11 [REDACTED]’ role over the years in training and supervising officers and approving police
 12 tactics, all the way through April of 2022, and his role since April of 2022 as a
 13 Communications and Records Manager (which covers the July 2022 incident in this
 14 litigation) that it would be unthinkable to permit Mr. Gage also to represent the
 15 Plaintiffs in any capacity. The only relief is to disqualify Mr. Gage and his firm from
 16 representing Plaintiffs and having any other contact with Plaintiffs or their counsel
 17 relating to this litigation.

18 **IV. CONCLUSION**

19 Defendant respectfully that this Court disqualify Bradley Gage and all attorneys
 20 and employees at the Law Offices of Goldberg & Gage, and order that they not have
 21 any involvement or contact with Plaintiffs, their other counsel, or anyone else
 22 involved in this litigation regarding this case. Mr. Gage and his office have a conflict
 23 of interest, and the conflict cannot be waived.

24

25

26

27

28

1 DATED: January 20, 2023

2 CARPENTER, ROTHANS & DUMONT
3 LLP

4 By: /s/ Yaron F. Dunkel

5 STEVEN J. ROTHANS
6 SCOTT CARPENTER
7 YARON F. DUNKEL
8 Attorneys for Defendant CITY OF SAN
9 BERNARDINO, a public entity

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF YARON F DUNKEL

I, Yaron F. Dunkel, declare as follows:

1. I am an attorney-at-law duly licensed to practice before all of the courts of the State of California and am a member in good standing of this court, and an attorney in the law firm of Carpenter, Rothans & Dumont, attorneys of record for Defendant City of San Bernardino, a public employee.

2. I state the following facts from my personal knowledge, except those facts stated on information and belief which I believe to be true, and if called as a witness I could and would so competently testify thereto under oath.

3. This Motion is made following a formal meet and confer efforts with Plaintiffs' counsel pursuant to Local Rule 7-3. On December 30, 2022, I sent Plaintiffs' counsel a detailed correspondence which set forth the grounds for this motion and supporting legal authorities. I proposed a conference call. On January 5, 2023, I had a telephone conference with attorney Bradely Gage regarding the issues raised in this motion. The parties could not agree on the motion. Therefore, I filed the present motion.

4. Filed herewith as Exhibit "A" is a true and correct copy of a letter dated July 26, 2022 signed by "Leticia Lopez, assistant to: Bradley C. Gage", enclosing "a copy of the DFEH complaint, Notice of Case Closure, and Right to Sue filed against the City of San Bernardino by [REDACTED]". The Department of Fair Employment & Housing's cover letter that Ms. Lopez provided was directed to "Bradely Gage" and the Right to Sue letter itself, also dated July 26, 2022, was directed to "[REDACTED] [REDACTED] c/o Law Offices of Goldberg & Gage".

5. Filed herewith as Exhibit "B" is a true and correct copy of the Declaration by City of San Bernardino's Police Chief Darren Goodman, in support of the motion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 20, 2023, at Los Angeles, California.

/s/: Yaron F. Dunkel

Yaron F. Dunkel - Declarant